KITCHENS PRODUCTIONS, INC.

IBLA 99-238 Decided June 23, 2000

Appeal from a decision of the Ridgecrest, California, Field Office, Bureau of Land Management, increasing the annual rental for communication site right-of-way from $5,807.77 to $37,000. CACA 6482.

Vacated and remanded for reappraisal, petition for stay denied as moot.

1. Administrative Procedure: Administrative Record--Appraisals--Communication Sites--Rights-of-Way: Appraisals--Rights-of-Way: Federal Land Policy and Management Act of 1976

   A BLM decision increasing rental rate above the schedule rent because the appraised rent exceeds the schedule rent by more than a factor of five will be vacated and the case remanded for reappraisal where the appraisal fails to establish sufficient familiarity with the communication site being appraised and the communication uses thereon.

2. Administrative Procedure: Administrative Record--Appraisals--Communication Sites--Rights-of-Way: Appraisals--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Where an appraisal determined fair market rental value based on analysis of Los Angeles Basin Data and comparable telecommunication site leases but did not disclose any of the particulars of such data, thereby precluding independent verification of the lease data, effective challenge as to the accuracy of the data and appraisal, and meaningful review by the Board, a BLM decision increasing rental based on an appraisal is properly vacated and remanded for reappraisal.

3. Administrative Procedure: Administrative Record--Appraisals--Communication Sites--Rights-of-Way: Appraisals--Rights-of-Way: Federal Land Policy and Management Act of 1976

It is incumbent upon BLM to ensure that its decision is supported by a rational basis, and that such basis is stated in the written decision and is demonstrated in the administrative record accompanying the decision. The recipient of the decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board.

APPEARANCES: Edward K. Tipler, P.E., President, Kitchen Productions, Inc. for appellant.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Kitchens Productions, Inc., 1/ the grantee of communications site right-of-way CACA 6482, has appealed from a March 1, 1999, decision of the Ridgecrest (California) Field Office, Bureau of Land Management (BLM), increasing annual rental for the site from $5,807.77 to $37,000. The site is located on El Paso Peak in the Ridgecrest Resource Area, in Kern County, California. As described in appellant's right-of-way application, the El Paso Peak site is mixed microwave, mobile, and broadcast uses. Pursuant to the provisions of 43 C.F.R. § 2803.1-3(d)(7), the annual rent for 1999 2/ was increased almost eight and a half times because the appraised rent of $37,000 exceeds the schedule rent of $4,362.54 by more than a factor of five. (Decision at 1.) Appellant also seeks a stay of the decision. Because we reach the merits and have determined to vacate and remand the decision for further action, the requested stay is denied as moot.

1/ The case file shows that Edward K. Tipler and James L. Rieger, doing business as Kitchen Productions, Inc., applied for right-of-way CACA 6482 on Nov. 26, 1982, for the purpose of locating several business and broadcast FM radio stations "within existing facilities of Kitchen Productions at proposed [El Paso Peak] site * * *." (Right-of-Way Application at 2.) Tipler and Rieger are also the principals in Tortoise Communications, which is the grantee of communications site right-of-way CACA 8665, dated Sept. 17, 1984, pursuant to which Tortoise provides mobile land communications services from the Kitchen Productions facilities at El Paso Peak.

2/ The appraisal was completed late in 1997 and was not used for the 1998 rental. (Decision at 1.)

According to information supplied by appellant on November 20, 1998, for 1999 rental calculations, Kitchen Productions has five tenants (three paging users and two specialized mobile radio service repeaters); five private specialized mobile radio (PSMR) users; one FM broadcast station (KZIQ); five county and local government users (internal communications only); two FM translators for non-profit organizations; and appellant and Tortoise are identified as the facility manager and as paging, mobile telephone, and repeater users. On January 22, 2000, appellant informed BLM that it had lost three FM broadcast stations (Victor Broadcasting, KLOA, and KRAJ), that it had no cellular uses in its facility, and that it has one licensed commercialized specialized mobile radio (CSMR) repeater with interconnect.

At issue in this appeal is the appraisal dated December 20, 1997, prepared by David J. Yerke, 3/ (appraisal) for BLM's California State Office. By memorandum dated February 20, 1998, the State Office Appraisal Staff reviewed and approved the appraisal, concurring in the conclusion that the appraised rent exceeded the schedule rent by five times or a factor of five. See 43 C.F.R. § 2803.1-3(d)(7)(iv). As set forth in the appraisal, the fair market rental value "Total Rent" was composed of two items, a "Base Rent" of $15,000 and "Tenant Rent" of $24,000, calculated at $1,000 for each co-located tenant.

To determine fair market rental value of the El Paso Peak communication sites Yerke examined two data bases. One data base reflects an analysis of leases in the Los Angeles Basin (LAB) area, while the other reflects the "most comparable leases" selected from among 280 mountaintop communications site leases. (Appraisal at 34.) It appears that the LAB data analysis is excerpted from a document or collection of documents called "Summaries of Lease Information Submitted to Equitable Fee Committee" (Summaries), which pertain to 324 communication site leases in the LAB "vicinity," 219 of which are for cellular sites. The Summaries apparently were utilized by BLM in developing its current rent schedule. (Appraisal at 34-35.)

After eliminating certain leases because of age or unusual terms, and after excluding extremes in rent, the appraiser concluded that

> the typical or average rent paid in the LAB vicinity for all non-broadcast uses other than cellular (cell sites and enhancers) is about $9,400 per year. Cell sites and enhancers (sites not primarily used for original transmission) appear to be about 10% higher or about $10,400 per year. Whether or not the 10% difference is of significance is debatable.

(Appraisal at 35; see also Table IV at 36.) Neither the Summaries nor the data extracted from them are contained in the record before the Board,

---

3/ Yerke is a member of the Appraisal Institute and clearly is a qualified appraiser.

because the appraiser asserts, and BLM accepted, that such information is confidential. (Appraisal at 6.)

Yerke also consulted an independent Federal land-use and telecommunication expert, Carl Cory, who provided his opinions and observations, which Yerke summarized at length. (Appraisal at 32-34.) Second, he interviewed the real estate managers of Airtouch Cellular, a very large provider of wireless communications services, and Antenna Systems (American Tower), a company which only leases sites to telecommunication companies in California and provides no communications services, to obtain their views regarding what constitutes a fair market rental for mountaintop communications sites. (Appraisal at 37.)

To develop the data on comparable sites, Yerke looked at lease data obtained from the entire state, identifying 280 leases to analyze, of which 35 leases in 24 locations were "analyzed in-depth." The 35 leases encompass a variety of telecommunication uses, including some of those occurring at appellant's facilities, but not broadcast radio or television leases, although appellant has one FM broadcast station. (Appraisal at 35.) In addition, there was no reference to FM translators in the appraisal and no indication of whether a use is low- or high-power. Instead, the appraisal identifies only "PMRS/CMRS and FM broadcast" as the two types of communication uses on El Paso Peak to be analyzed. (Appraisal at 40.)

The site was examined in light of five of the "most pertinent" leases with respect to FM/TV/Cellular uses and CMRS/PMRS uses on the following points of comparison: Location, Ownership Status, Lease Terms, Utilities, Access, Population Served, and Traffic/Corridor VPD (vehicles per day). (Appraisal at 41-43, Tables VI and VII.) In fact, the appraisal scrutinized location among the comparables, but did not indicate how those locations compared to appellant's location, and did not explain its failure to do so. This examination resulted in two Market Data Comparison Matrices (Tables VIII and IX, Appraisal at 42-43), and the following conclusions with respect to fair market rental:

> Our telecommunications expert's analysis of cellular, microwave and special mobile radio service leases concluded that rental rates should be approximately $9,000 per year for any site in the LAB. A telecommunications industry survey of two major companies concluded that a range of $12,000 to $24,000 per year for cellular, microwave and PCS appears to be reasonable.
>
> Analysis of 35 leases generated through the appraiser's research concluded with the indication that rental rates average $13,890 for cellular uses; $5,969 for microwave sites; $6,500 for PCS uses and $19,474 for CMRS/PMRS sites.

> The analysis which preceded this section [the comparison of the five most comparable leases for each type of use at 40-43 of the Appraisal] produced a rental rate range from $3,000-$7,500 for microwave uses; $12,000-$20,000 involving FM/TV/cellular sites; and $8,000 to $29,000 for CMRS/PMRS uses.
>
> After considering each category and individual market data but placing more weight on the analysis which selected the most comparable leases the following annual rental rates are concluded for the subject property.
>
> - CMRS/PMRS: $10,000
> - FM/TV/Cellular $15,000

(Appraisal at 43.)

Before turning to appellant's contentions on appeal, we must note several key assumptions underlying the appraisal. The appraisal assumes that the El Paso Peak site is "similar to the private sector and no special rates are given to telecommunication users; all users pay the rental dictated by the market." (Appraisal at ii.) Information and opinions obtained from others, including BLM, are deemed "true and correct," but the possibility that "[s]ubsequent changes in information provided could affect the rental rate conclusions" is acknowledged. (Appraisal at 1, 2.) It is further assumed that the site could be leased at "prevailing market rents" (Appraisal at 2), and it is further assumed that there are three improved telecommunication sites on El Paso Peak.

Although no site plan was provided and Yerke states that "[n]o information is available on the remaining sites," appellant is said to occupy a 90,000 square foot pad area. (Appraisal at 4.) We note also that Yerke certified that he had "made a personal inspection of the property," and that this consisted of an aerial inspection. (Appraisal at 3, 5.) Lastly, he asserted that "[a] reasonable effort ha[d] been made to confirm the details of each item of market data with principals or other knowledgeable parties to the transaction. However, due to the proprietary nature of the information, data sources must remain confidential." (Appraisal at 6.)

In its statement of reasons for appeal (SOR), appellant challenges the appraisal on the ground that it proceeds upon wrong assumptions instead of facts to support the fair market rental value determination. Specifically, appellant asserts that the appraiser was unfamiliar with the communication site itself and communications uses thereon, that he did not properly assess the local economy and communications market, and that the types of uses on El Paso Peak are misclassified, resulting in significant flaws in the appraisal. Second, appellant challenges the methodology employed by the appraiser in determining fair market rental value, particularly the selection of the comparable sites and the lack of information in the record as to the specific locations and parties involved in the private lease transactions the appraiser analyzed and compared. Third, appellant

argues that the appraised rent will inflict undue hardship on it and on its customers. No response to appellant's SOR was filed by BLM. We will treat appellant's challenges in seriatim.

Asserting that the appraiser had no personal knowledge of the communications site atop El Paso Peak, appellant argues that the aerial inspection was inadequate. As evidence of the inadequacy of the inspection, appellant disputes the appraiser's assertion that it occupies a 90,000 square foot pad area, contending that its building pad occupies a 15- by 20-foot area, that its tower pad occupies a 10- by 20-foot fenced compound, its standby generators occupy a 10- by 20-foot area, of which a 5- by 10-foot area portion is a fenced concrete pad. Further describing its facilities, appellant states

> we have two 30-foot tall poles in another unfenced location to the South of the main facility for two receive-only antennas. Any additional areas are only for the purpose of defining microwave antenna paths so that additional facilities would not be built such that they would obstruct our signal paths. These areas can be reassigned by the BLM at their discretion for non-interfering uses.

(SOR at 4.)

Claiming that site maps exist and that another grantee on El Paso Peak, Poulin Corporation, submitted several in connection with Poulin's activities, appellant questions the statement that there are three separate telecommunication sites on El Paso Peak, contending that there is a fourth site, and that it is occupied by Kern County's communication building. Appellant argues that the existence of this site should have been included, even though Kern County does not rent space in the commercial market, and that a fifth large commercial facility has been constructed since the appraisal was prepared. Appellant contrasts the remoteness of the Ridgecrest community and its declining economy, which is heavily dependent on the presence of the Federal Government in the area, with the nearby naval telecommunication facilities on Laurel Mountain and the public utilities and Federal Aviation Authority facilities on Government Peak in an effort to demonstrate that the appraisal "simply failed to properly state the existing local communications market and the abundance of available building and tower space at El Paso Peak that will likely never be utilized in this economy." (SOR at 3-4.)

Appellant finds further error in the appraisal's classification of communication uses:

> Particularly, one line item in the bill is $15,000 rent for an FM Translator station that we provide as a donated service. The translator, a low-power 1-Watt "booster" station brings reception of a Non-Commercial FM station to the community, on

> which [appellant is] prohibited by FCC [Federal Communications Commission] Regulation from making any income.

(Stay Request at 1.) Appellant argues that its one watt FM translator should not be classified as an FM broadcaster, because translator licenses are granted pursuant to "a different part of the FCC Rules," and Kitchen Productions holds no high-power broadcast licenses. Appellant specifically contends that its translator is not capable of originating local broadcasts, and that it is utilized to "frequency-shift a distant station and amplify the signal to a maximum of One-Watt output signal as a booster for that signal into the remote community." (SOR at 1.)

Similarly, appellant argues that some uses had been incorrectly reported to BLM as tenants when, in fact, they are customers:

> [A] TENANT is an entity that has their own equipment in [a] facility, obtains their own maintenance on their equipment, has a contract with [the facility owner] for that space, and their own access (keys and alarm codes) to that facility. Several of the entities that we had been reporting as tenants are not under any kind of contract, but are billed monthly for SERVICES, which we provide as a turnkey operation. We own the repeater/transmission equipment including all feedlines, antennas and filters/duplexers, and ancillary equipment, and provide a complete package of service that includes maintenance or replacement of equipment at the El Paso Peaks facility so that the customer only has to pay a monthly fee for that complete package.

(SOR at 7.) According to appellant, the entities previously reported as tenants, which are properly reported as customers, are Sierra Sands School District, Granite Construction, Mojave School District, Western Exterminator, Mediacom Cable Television, and Desert Area Resources and Training. (SOR at 8.)

Appellant states that the repeaters and mobile phone used by Tortoise Communications consist of four systems that are licensed as community repeaters. It characterizes the Tortoise Mobil phone as

> just a regular community repeater but with the added FCC authorization for interconnection (to the telephone system). Many repeater system operators get the additional authorization for interconnect for their community repeaters, but often do not install the phone-patch equipment unless a customer is willing to pay for that additional service on the otherwise dispatch service repeater. * * * Generally, two way radio companies do not report systems such as this as mobile telephone as the FCC license is primarily for dispatch operations, with the interconnection as an ADDITIONAL authorized use for the system.

> Our community repeater with interconnect system is NOT a Radio Common Carrier (RCC) facility, but is licensed in the Business Radio Service, Part 90.

(SOR at 8.)

Appellant argues, moreover, that there are two entities which are exempt from paying rent to BLM because their systems are for internal radio dispatch communication only and they do not offer their system(s) for use by other companies or persons. These entities are Federal Express North America and IMC Chemical Company. (SOR at 9.) Appellant urges that the City of Ridgecrest, including the City of Ridgecrest Transit, and the Inyo County Sheriff should be exempt from the payment of rent, because Kitchen Productions has "kept their rental rates down because [it] ha[s] not had to pay any rent to the BLM for these tenants." (SOR at 9.)

Appellant has submitted information regarding the rents actually paid by its tenants and customers in 1999, 4/ which on its face shows that the projected 1999 gross income of Kitchen Productions would be less than the appraised annual rent. In addition, as part of its showing of hardship, appellant's SOR includes a discussion of its operating, maintenance, and amortization costs. (SOR at 10-11.) We note, however, that appellant provided no evidence to support these allegations.

Kitchen Productions' final points are that the appraisal's population estimate of 28,700 for Ridgecrest is in error, and that the correct population is 22,000, placing the area in the smallest population category (under 25,000) of the schedule rent. (SOR at 1-2, 4, 11.) Citing "the language of the 1995 final rule amending 43 C.F.R. 2800, et al," appellant argues that population density and land value are directly related, and that rent for telecommunication sites are to correspond to the size of the populations they serve. (SOR at 1-2.) Lastly, under the caption Highways, appellant describes the area covered by its repeaters and the obstacles to good reliable reception and transmission, arguing that "[t]he assertion that El Paso Peak provides an excellent coverage of the area is not really true, if you count only commercially viable areas." (SOR at 12-13.) By this argument, appellant obviously intends to further challenge the basis and adequacy of the lease comparisons utilized in the appraisal.

[1] We begin our discussion with the basic tenet that, to sustain a BLM decision setting rent based on an appraisal, the appraisal must demonstrate that the appraiser has personal knowledge of, and is familiar with,

---

4/ Appellant, which appears pro se, asserts that the information is confidential, but did not comply with the provisions of 43 C.F.R. § 4.31. It is not necessary to reveal appellant's customer account information in this opinion, but appellant is strongly advised to acquaint itself with the requirements of the regulation and the potential consequences of having failed to comply with it.

the site being appraised. While we do not hold that an aerial inspection can never be an adequate means of examining a property, in this case we have little difficulty in finding that it was not. 5/ On appeal, appellant has alleged a number of fundamental facts regarding the nature and extent of its operations, including the proper classification of its facility users, which, if true, would have a direct bearing upon the appraisal, specifically on the selection and analysis of comparables and per-user rental calculations.

We have no doubt that the appraiser reviewed the state-wide lease information and data to which he referred in the appraisal, or that it revealed important facts about telecommunication site leasing activity in California. 6/ Our problem is that, on one hand, the appraisal methodology assumes that all information provided from other sources is current and correct, and does not, on the other hand, mandate a personal inspection of the site being appraised. We fully understand and appreciate that an appraiser does not, by virtue of agreeing to appraise a property, undertake to verify the accuracy of any and all information affecting fair market rental value analyses prepared or provided by third persons. To acknowledge as much is not, however, to agree that an appraiser need not verify the other half of the fair market rental value equation -- that is, the actual conditions and facts of the property being appraised. Appellant's allegations suggest facts and circumstances which, if true, necessarily influence the analysis of the market and thus the fair market rental calculation. Thus, the failure to conduct an on-the-ground inspection, in our view, constitutes a serious defect.

[2] The next significant problem is the asserted confidentiality of the particulars of the leases selected as comparable to appellant's site. This Board has previously addressed and rejected the claim that site-specific information reviewed by an appraiser to establish the fair market rental of a communication site right-of-way is confidential. Thus, in Mountain States Telephone & Telegraph Co., 107 IBLA 82, 89 (1989), we vacated and remanded BLM's Master Appraisal, stating:

> We agree with Appellant, however, that the Master Appraisal is fatally flawed by the fact that it fails to disclose the location of private lease transactions and the parties thereto, such that Appellant could verify the data obtained. BLM states in the Master Appraisal at page 8: "A summary of lease data is included for each type or group

---

5/ If there was any good practical or professional reason for not conducting an on-the-ground inspection of the El Paso site, it was not stated in the appraisal and did not appear from the record before the Board.

6/ We found nothing in the appraisal or the record before us that shows or explains the "reasonable effort" Yerke actually made to confirm the details of each lease. (Appraisal at 6.)

> of market rentals. Maps are not included to protect the confidential nature of market data. Lessor and lessee names have also been withheld to protect confidential information obtained." BLM provides no legal basis for its determination to withhold the information it has described as "confidential," nor are we familiar with any. Therefore, we must conclude that failure to disclose the location of the lands covered by the private leases and the identity of the parties to those lease transactions relied upon by BLM in the Master Appraisal precludes independent verification of that lease data and, thus prevents any effective challenge to the accuracy of the data on appeal, as well as any meaningful review by the Board. Cf. Southern Union Exploration Co., 51 IBLA 89, 92 (1980) (decision rejecting competitive oil and gas lease high bid must be supported by record showing the factual basis for the decision sufficient to provide the bidder with the information necessary to understand and accept the rejection or, alternatively, appeal and dispute the determination, and the information must be part of the public record and adequate such that the Board is able to judge its correctness on appeal.) Thus, the Board has no way of determining whether $1,500 represents the fair market rental value of the right-of-way in question.

107 IBLA at 89; see also H.E. Hunnewill Construction Co., 137 IBLA 101, 109 (1996) (appraisal in trespass case following same rule). As was the case in Mountain States Telephone & Telegraph Co., supra, we find BLM's assertion of confidentiality to be unsupported and therefore reject it.

[3] It is incumbent upon BLM to ensure that its decision is supported by a rational basis, and that such basis is stated in the written decision and is demonstrated in the administrative record accompanying the decision. The recipient of the decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. The Navajo Nation, 150 IBLA 83, 88 (1999); The Pittsburg & Midway Coal Mining Co. v. OSM, 140 IBLA 105, 109 (1997); U.S. Oil and Refining Co., 137 IBLA 223, 232 (1996); The Klamath Tribes, 136 IBLA 17, 20 (1996); Larry Brown & Associates, 133 IBLA 202, 205 (1995); Eddleman Community Property Trust, 106 IBLA 376, 377 (1989). Lacking the information necessary to conduct an objective, independent review of the basis for the decision, an administrative decision is properly set aside and remanded. U.S. Oil and Refining Co., supra at 232; Larry Brown & Associates, supra at 205; Eddleman Community Property Trust, supra at 377.

The appraisal raises other questions that we cannot confidently answer from the record before us. For example, it somewhat inconsistently states that the types of communication uses in appellant's facility are PMRS, CMRS, and FM broadcast (Appraisal at 5), and that "the primary uses on the subject property are confined to microwave and FM broadcast uses (Appraisal at 40)." Yet the fair market rental value of $15,000 is assigned to "FM/TV/Cellular." (Appraisal at 43.) In its Inventory of Uses, appellant stated that it has no cellular services or equipment in

its facilities, an allegation not addressed in the appraisal at all. More to the point, the appraisal does a thorough job of explaining the different communication uses in the current market, including the technical differences between FM Broadcast and broadcast translators, but it does not comment upon the presence or absence of translators in appellant's facility, and it does not state whether FM, television, and cellular uses are always treated and priced the same in the market, or whether there are any other facts that affect value, such as whether it is high- or low-power use, or appellant's argument that use of the translator station is donated and that donation is required by FCC rules.

Another example is provided by the Fair Market Analysis section of the appraisal, which relies upon and includes a discourse on the telecommunication site market by Cory. In particular, Cory states that

> there is less and less distinction among the needs of the various services regarding sites. As might be expected, it would be reasonable to put PCS in the same category as cellular uses. It is even likely that, except for high-power broadcast stations and no-profit or low-profit users (amateurs, government, Red Cross, Joe's Plumbing), the difference[s] between different uses are not real but more as a result of an unorganized market where many times the criteria needed to define a Fair Market Rent (FMR) transaction are missing or distorted. "Population served" has only limited usefulness as an indicator of rental rates. Rents are probably higher in larger population areas because of the overall higher land values and larger, overall business potential. For many communication services "population served" is a meaningless measure.
>
> * * * * * * *
>
> Another factor affecting the value or rental rate to a buyer is the practice of the real estate department of a large company applying an "unwritten" standard estimate of what is an acceptable rental rate to management. If it is understood that a rate of $1,000 per month ($12,000 annually) is normally acceptable and is not usually questioned by management, real estate agents are more likely to offer that amount and not waste time haggling or looking elsewhere for a cheaper parcel.
>
> Value to the facility owner (grantee or lessee of the parcel) is usually not a result of population served, ease of access, parcel size, elevation or some of the other popular measures that have been suggested. Since the industry is changing to cellular and networking technology, coverage of a large area from a single site is less valuable than in the past and, in fact, may be a hindrance. While many large companies are installing their own microwave networks to avoid paying public telephone rates, smaller companies with vehicle fleets are

> able to use cellular telephones for their dispatch/communications needs and no longer need their own private radio system. If a site serves as an interconnecting node in a network system, the ability for that site to p[er]form that function is what gives it value to the company, not the "population served." Population served can be a rental or value indicator only where "serving the population" is actually the function of the site.

(Appraisal at 33-34, citing Cory.)

Yerke obviously included Cory's commentary because he regards Cory's opinion as authoritative. As the language quoted above shows, however, it appears that Cory eschews virtually all of the variables that Yerke analyzed as reliable indicators of fair market rental value. Moreover, according to Cory, the most important indicator of value -- whether and to what extent appellant's site serves as an interconnecting node in a networking system (Appraisal at 34) -- turns upon some of the very facts that the appraisal did not address. In particular, appellant contends that Tortoise Mobilephone is a community repeater authorized for interconnection by the FCC, but avers that no such interconnection has been activated. (SOR at 8.) We are unable to ascertain from the appraisal which of the principles or considerations described by Cory actually should apply or were applied to appellant's situation. This uncertainty is magnified by Yerke's acknowledgment that there is a "broad range" of rents in all the categories of uses in the "LAB vicinity." 7/ (Appraisal at 35.)

In addition, we question the utility and comparability of the Airtouch and Antenna Systems commentary for the purpose of valuing Kitchen Productions' site, since that commentary, at least as set forth in the appraisal, merely describes each organization's own rental policy and practice and does not address the particulars that actually affect individual valuations. Furthermore, Yerke states that

> none of the categories [of ownership status, lease terms, utilities, access, population served, and traffic/corridor VPD] produced an identifiable trend in the direction of a rental rate for the subject property. This information is included for informational purposes and leads to the conclusion that rental rates are not driven by the amount of population served or the traffic corridor it covered. The exception would be TV or radio broadcasters.

(Appraisal at 42.) What is not clear from the appraisal is whether population and travel corridors are actually meaningless measures in the case of Kitchen Productions, and if so, why they were included as points of comparison at all. Thus, we find merit in appellant's questions regarding the basis for comparing Ridgecrest to various leases in the "vicinity of

---

7/ What precisely is encompassed by the terms "LAB" (Appraisal at 34) and the "LAB vicinity" is not defined in the appraisal.

the LAB" (Appraisal at 42-44) and the reasons why a site is deemed "similar," "inferior," or "superior." 8/ In addition, as noted above, location was analyzed in selecting comparable leases, but it was not a point of comparison to appellant's site.

As to appellant's arguments regarding the uses that are properly subject to the rent schedules, it is correct that rent cannot be collected for communication uses of Federal, state, and local governments, and agencies and instrumentalities thereof, unless the use is for commercial purposes or by municipal utilities and cooperatives whose principal revenue is customer charges. 43 C.F.R. § 2803.1-2(b)(1)(i).

In addition, 43 C.F.R. § 2803.1-2(d) provides:

> The annual rental payment for communication uses listed in paragraph (d)(1) of this section is based on rental payment schedules. The rental schedules apply to right-of-way holders and tenants authorized to operate and maintain communication facilities on public lands. They do not apply to holders who are public telecommunication service operators providing public television or radio broadcast services or radio broadcast services granted a waiver under § 2803.1-2 (b)(2)(i).

(Emphasis added.)

8/ Tables VI and VII each describe five leases for two separate groups of telecommunications uses which are said to be most comparable to appellant's site. Tables VIII and IX depict how each of the 10 leases compares to appellant on 6 points. For example, comparable lease No. 1 in Table VI (FM/TV/Cellular uses) is a desert site near a population of 240,000 and 60,000 VPD. As to population and VPD, it is declared inferior to appellant's site. Comparable lease Nos. 3 and 5 in Table VII (CMRS/PMRS) are located in northern California, with respective populations of 140,000 and 123,000, and VPD of 171,000 and 50,000. These sites are deemed inferior to appellant's site with regard to those criteria, despite apparently significant differences in population and vehicular traffic which would suggest higher land values. On the other hand, No. 4 in Table VII is a desert site with a 1 mile access, a nominal population and 50,000 VPD, but is said to be similar with respect to access, superior as to population, and inferior as to VPD. The access of comparable lease No. 5 in Table VII, is 4 miles away from the site, but it is deemed superior to appellant's access, which is a dirt road with paved access 4 miles away, but adjacent access and access of 1 mile and 1.25 miles is declared similar to appellant's access. Without more detail and explanation than was provided in the appraisal, on this record we are unable to reconcile the various premises upon which it proceeds.

More specifically, among other things, the rent schedules apply to the following:

(ii) AM and FM radio broadcasts for general public reception, excluding low power FM radio, translators, boosters or microwave relays serving broadcast translators, and communication equipment directly related to the operation, maintenance, or monitoring of the use, 43 C.F.R. § 2803.1-2(d)(1)(ii);

(v) CMRS and facility managers providing mobile communication service to individual customers, including "two-way voice and paging services such as community repeaters, trunked radio (specialized mobile radio), two-way radio dispatch, public switched network (telephone/data) interconnect service, microwave communications link equipment, 43 C.F.R. § 2803.1-2(d)(1)(v);"

(vi) Private mobile radio systems "used for a single entity mobile internal communications" and communication equipment directly related to the operation, maintenance, or monitoring of the use, which is not sold to other users, and includes private local radio dispatch, private paging services, and ancillary microwave communication equipment, 43 C.F.R. § 2803.1-2(d)(1)(vi);

(vii) Cellular telephone consisting of "cell sites containing transmitting and receiving antennas, cellular base station radio, telephone equipment, and often microwave communications link equipment, communication equipment directly related to the maintenance and monitoring of the use, 43 C.F.R. § 2803.1-2(d)(1)(vii);

(viii) Microwave used for "long-line intrastate and interstate public telephone, television, information, and data transmissions," and communication equipment directly related to the operation, mainetenance, or monitoring of the use, 43 C.F.R. § 2803.1-2(d)(1)(viii).

43 C.F.R. § 2803.1-2(d)(1) (emphasis added). Some of appellant's arguments thus are well-founded in the regulations.

Moreover, appellant is correct that there is a distinction between tenants and customers. A "tenant" is "an occupant who rents space in a facility and operates communication equipment in the facility to resell the communication service to others for a profit." 43 C.F.R. § 2800.0-5(bb). It does not include PSMR or any use described as other com-munication uses in 43 C.F.R. § 2803.1-2(d)(1)(ix). In contrast, a "customer" is a "person paying the facility owner or tenant for communication services, and is not reselling communication services to others," and it includes "[p]ersons or entities benefiting [sic] from private or internal communication uses

located in a CMRS facility." 43 C.F.R. § 2800.0-5(cc). Appellant's allegations regarding the nature of the uses at its site, if true, therefore may affect the rental calculation or appraisal analysis and underlying assumptions. Because the appraisal did not provide the particulars of the information obtained from others, including BLM, or the nature of the effort made to confirm it, we are unable to ascertain whether each use was properly designated as customer or tenant. Similarly, because the appraisal did not state the classification of each communication use at appellant's site, we cannot determine whether any such classification was correct, whether it accords with BLM's information, or whether it was properly treated in identifying and selecting comparable sites.

The final matter to be addressed is appellant's assertions of hardship. Under the regulations the authorized officer may reduce or waive the rental payment in two instances that are or may be relevant here: when the right-of-way holder provides a valuable benefit to the public or to the programs of the Secretary free of charge or at a reduced rate, and when the rental will cause undue hardship and the authorized officer determines, with the State Director's concurrence, that it is in the public interest to reduce or waive said rental. 43 C.F.R. § 2803.1-2(b)(2). Furthermore, the authorized officer may use other methods to set rental payments for communications sites when a holder is eligible for waiver or reduction or will suffer undue hardship as specified in 43 C.F.R. § 2803.1-2(b)(2). 43 C.F.R. § 2803.1-3(d)(7)(i), (ii). Appellant did not request a waiver, reduction, or different method of establishing annual rental before filing this appeal, but we note that Kitchen Productions has made a prima facie showing of hardship before this Board. 9/

To summarize, we have before us an appraisal which lacks a personal inspection or verification of the facts of appellant's occupancy, lacks the requisite detail regarding the leases selected as most comparable, and raises basic factual questions that are unanswerable on this record. We find that appellant has established error in the appraisal by a preponderance of the evidence. See Eric C. Carlson, 141 IBLA 127, 139 (1997) (decision set aside where BLM was unfamiliar with, and failed to consider, relevant facts). On remand, BLM shall conduct a new appraisal in accordance with this opinion and shall render a new decision which shall be subject to appeal to this Board.

9/ We also note that, because a waiver or reduction of rent is always a possibility, assuming appropriate circumstances, we question the appraisal's assumptions that there are no special rates or exemptions from rent for telecommunication users, excepting amateur radio operators, and that all users pay the rental rate dictated by the market. (Appraisal at ii, 2.) Since this is not always the case with respect to Federal rights-of-way, we must also question the market effect of such differences and, consequently, the assertion that appellant's site is sufficiently similar to private sector sites to fairly permit comparison and appraisal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is vacated and remanded for reappraisal.

_____
T. Britt Price
Administrative Judge

I concur:

_____
John H. Kelly
Administrative Judge